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No. 15-628

In the Supreme Court of the United States

BASSAM YACOUB SALMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
ROSS B. GOLDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying *Dirks* v. *SEC*, 463 U.S. 646 (1983), to hold that an insider breaches his fiduciary duty and subjects himself to criminal insider-trading liability when he gifts confidential information to a trading relative or friend.

2. Whether the court of appeals erred in holding that the evidence in this case supported the district court's decision to give the jury a deliberate ignorance instruction.

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OPINIONS BELOW

The court of appeals simultaneously issued a published opinion (Pet. App. 1-17), which is available at 792 F.3d 1087, and an unpublished opinion (Pet. App. 18-25), which is available at 2015 WL 4071557. The orders of the district court (Pet. App. 26-52) are not published in the Federal Supplement but are available at 2013 WL 6655176 and 2014 WL 2967424.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2015. A petition for rehearing was denied on August 13, 2015 (Pet. App. 53). The petition for a writ of certiorari was filed on November 10, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, peti-

tioner was convicted of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff, 17 C.F.R. 240.10b-5, 240-10b5-1, and 240.10b5-2, and 18 U.S.C. 2. Am. Judgment 1. He was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1-25.

1. a. In 2002, Maher Kara (Maher) began working in the healthcare investment banking group at Citigroup. Pet. App. 4. In 2004, Maher began conveying to his older brother Michael Kara (Michael) confidential corporate information gleaned in the course of performing that job. *Ibid.*

Maher suspected that Michael was trading on the confidential information, although Michael initially denied it. Pet. App. 4. But as time passed, "Michael became more brazen and more persistent in his requests for inside information, and Maher knowingly obliged." *Ibid.* Between 2004 and 2007, Maher regularly shared with Michael "information about upcoming mergers and acquisitions of and by Citigroup clients." *Ibid.*

Throughout that period, Maher and Michael "enjoyed a close and mutually beneficial relationship." Pet. App. 6. Michael helped pay Maher's college tuition, "stood in for their deceased father at Maher's wedding," and taught Maher basic science to aid Maher in his work on healthcare issues at Citigroup. *Ibid.* Maher, in turn, "loved his brother very much," and he disclosed confidential corporate information to Michael to "'benefit him' and to 'fulfill[] whatever needs he had.'" *Ibid.* For instance, on one occasion Michael called Maher asking for a "favor" and for

"information"; when Michael refused Maher's offer of money, Maher tipped him about an upcoming acquisition. *Ibid.*

b. In 2003, Maher became engaged to marry petitioner's sister. Pet. App. 4. The Kara and Salman families—and Michael and petitioner in particular—formed a warm relationship. *Id.* at 4-5. In the fall of 2004, Michael began sharing with petitioner the inside information obtained from Maher. *Id.* at 5. Michael also advised petitioner to trade on that information, as Michael himself was doing. *Ibid.*

Petitioner took that advice. But rather than trade through his own brokerage account, he "arranged to deposit money, via a series of transfers through other accounts, into a brokerage account held jointly in the name of his wife's sister and her husband, Karim Bayyouk." Pet. App. 5. Petitioner conveyed the inside information to Bayyouk, who executed the trades, and the two split the trading profits—an amount that ultimately totaled approximately $1.7 million. *Id.* at 5, 19. "On numerous occasions," Bayyouk and Michael "executed nearly identical trades in securities issued by Citigroup clients shortly before the announcement of major transactions." *Id.* at 5.

c. Petitioner "knew full well that Maher Kara was the source of the information" that formed the basis for those trades. Pet. App. 5. Michael testified that he told petitioner "directly" at the outset that Maher was providing the information. *Ibid.* And in 2005, Michael saw papers on petitioner's desk relating to the trading and angrily warned petitioner to be careful with the information "because it was coming from Maher." *Id.* at 5-6. Petitioner agreed on the need to

"protect" Maher and promised to shred the papers. *Id.* at 6.

Petitioner also knew about the deep affection between Maher and Michael. Pet. App. 6. The Kara and Salman families were closely intertwined, and petitioner "would have had ample opportunity to observe Michael and Maher's interactions at their regular family gatherings." *Ibid.* And petitioner attended Maher's wedding, where Michael brought Maher to tears by giving a toast describing "how he spoke to [Maher] nearly every day" and explaining that Maher was "his 'mentor,' his 'private counsel,' and 'one of the most generous human beings he knows.'" *Id.* at 6-7.

2. Petitioner was charged with one count of conspiracy to commit securities fraud and four counts of securities fraud. The district court instructed the jury that petitioner could be found guilty of securities fraud only if the government established beyond a reasonable doubt that petitioner knew that he was trading on the basis of inside information and that the information had been improperly disclosed by an insider (Maher) for personal benefit. See Pet. App. 58-60.

As to the meaning of "personal benefit," the district court explained to the jury that "[p]ersonal benefit includes not only monetary gain * * * but also a reputational benefit or the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend. The benefit does not need to be financial or tangible in nature; it could include, for example, * * * making a gift of confidential information to a trading relative or friend." Pet. App. 61-62.

As to petitioner's knowledge, the district court gave an "actual knowledge" instruction as well as a deliberate ignorance instruction. The court explained deliberate ignorance by charging the jury that "[y]ou may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant: (1) was aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence, and (2) deliberately avoided learning the truth." Pet. App. 60. The court cautioned the jury, however, that "[y]ou may not find such knowledge * * * if you find that the defendant actually believed that the information he obtained was not disclosed in violation of a duty of trust and confidence, or if you find that the defendant was simply careless or reckless." *Ibid.*

3. The jury found petitioner guilty on all counts. Pet. App. 7. Petitioner moved for a new trial under Federal Rule of Criminal Procedure 33, arguing that the deliberate ignorance instruction was improper and that the government adduced insufficient evidence that Maher personally benefited from disclosing the inside information. *Id.* at 34-52. The district court denied the motion. *Ibid.* Petitioner subsequently moved for release pending appeal on the ground that the deliberate ignorance instruction was improper; the court denied that motion as well. *Id.* at 26-33.

4. In two separate, contemporaneously filed opinions, the court of appeals affirmed.

a. In a published opinion, the court of appeals rejected petitioner's argument, based on the Second Circuit's decision in *United States* v. *Newman*, 773 F.3d 438 (2d Cir. 2014), cert. denied, 136 S. Ct. 242 (2015), that "the evidence was insufficient to find ei-

ther that Maher Kara disclosed the information to Michael Kara in exchange for a personal benefit, or, if he did, that [petitioner] knew of such benefit." Pet. App. 9.

The court of appeals explained that, under this Court's decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983), a "tippee" who receives confidential inside information is liable if "the insider personally will benefit, directly or indirectly, from his disclosure" and "the tippee knows or should know that there has been such a breach" of fiduciary duty. Pet. App. 11 (brackets omitted) (quoting *Dirks*, 463 U.S. at 660-662). As to the existence of personal benefit to Maher, the court of appeals emphasized the statement in *Dirks* that an insider personally benefits from disclosing confidential information when he "makes a gift of confidential information to a trading relative or friend." *Id.* at 11-12 (emphasis omitted) (quoting *Dirks*, 463 U.S. at 664). The court found that "Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned." *Id.* at 12 (quoting *Dirks*, 463 U.S. at 664); see *ibid.* (noting that Maher testified he tipped Michael to "benefit" him and to "fulfill whatever needs he had") (brackets omitted). And as to petitioner's knowledge of the personal benefit to Maher, the court noted Michael's testimony "that he directly told [petitioner] that it was Michael's brother Maher who was, repeatedly, leaking the inside information that Michael then conveyed to [petitioner], and that [petitioner] later agreed that they had to 'protect' Maher from exposure." *Ibid.* The court stated that, given "the Kara brothers' close relationship, [petitioner] could

readily have inferred Maher's intent to benefit Michael." *Ibid.* Accordingly, the court concluded, "there can be no question that, under *Dirks*, the evidence was sufficient for the jury to find that Maher disclosed the information in breach of his fiduciary duties and that [petitioner] knew as much." *Ibid.*

The court of appeals then addressed *Newman*, which stated that "to the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, * * * such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." 773 F.3d at 452. The court rejected petitioner's argument that "because there is no evidence that Maher received any such tangible benefit in exchange for the inside information, or that [petitioner] knew of any such benefit, the Government failed to carry its burden." Pet. App. 15. "To the extent *Newman* can be read to go so far," the court stated, that decision would "depart from the clear holding of *Dirks*." *Id.* at 15-16 (citing *Dirks*, 463 U.S. at 664).

The court of appeals also noted that the evidence of securities fraud in this case was clear and direct. See Pet. App. 17. The court observed that "the evidence that Maher Kara breached his fiduciary duties could not have been more clear, and the fact that the disclosed information was market-sensitive * * * was obvious on its face." *Id.* at 16; see *ibid.* ("the Government presented direct evidence that the disclosure was intended as a gift of market-sensitive information"). In addition, in the court's view, "the jury

could easily have found that, as a close friend and member (through marriage) of the close-knit Kara clan, [petitioner] must have known that, when Maher gave confidential information to Michael, he did so with the intention to benefit a close relative." *Id.* at 17 (internal quotation marks omitted).

b. In an unpublished opinion, the court of appeals rejected petitioner's argument that under *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011), "a deliberate ignorance instruction was not warranted because the Government presented no evidence that [petitioner] took any deliberate action to avoid learning the source of Michael Kara's tips." Pet. App. 23-25.[1] The court explained that *Global-Tech* "did not alter the standard for deliberate ignorance; rather, it imported the well-established criminal standard into the civil context." *Id.* at 24. The court concluded that, consistent with *Global-Tech*, a failure to investigate "under circumstances where a reasonable person would make further inquiries" can raise the inference that the defendant took a "deliberate action" to avoid learning the truth. *Ibid.* (citing *United States* v. *Ramos-Atondo*, 732 F.3d 1113, 1119 (9th Cir. 2013)).

In this case, the court of appeals concluded, "if the jury believed that [petitioner] did not actually know that the information was coming from Maher Kara, then it could rationally have concluded that the reason he did not know was that he deliberately refrained from asking." Pet. App. 25. The court explained that the highly suspicious circumstances "ampl[y]" indicated such a deliberate course of action: petitioner was

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[1] *Global-Tech* refers to "willful blindness," see 131 S. Ct. at 2070; the court of appeals referred to the same concept as "deliberate ignorance." This brief uses those terms interchangeably.

"investing large sums of money on short notice, in companies in which he had never invested previously," *id.* at 24-25; the information he was receiving was "highly accurate" and "inherently proprietary in nature," thereby "suggesting that it came from a source with inside access to the various companies," *id.* at 25; and petitioner "knew the Kara family well," indicating "that he was aware of Maher's employment at Citigroup and of the Kara brothers' close relationship," *ibid.*

ARGUMENT

Petitioner argues that the Court should grant review to resolve a conflict over what constitutes "personal benefit" for purposes of establishing criminal insider-trading liability (Pet. 11-15), and to confirm that deliberate ignorance exists only if a defendant takes deliberate actions to avoid learning the relevant facts (Pet. 15-21). Further review of the decision below is not warranted. This Court recently declined to review the "personal benefit" issue, and no different result is warranted here—particularly because the decision of the court of appeals on that issue is correct and fully consistent with this Court's decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983). The court of appeals also correctly held that a deliberate ignorance instruction is proper when the evidence can give rise to an inference that the defendant deliberately avoided learning the truth, and its decision on that point does not conflict with any decision of this Court or another court of appeals.

1. a. In *Dirks*, this Court addressed the scope of "tipper-tippee" insider-trading liability—that is, liability that arises from an insider's disclosure of confidential corporate information to others who "exploit[]" it

for their "personal gain." 463 U.S. at 659. The Court explained that a tippee's duty is "derivative from * * * the insider's duty." *Ibid.* Accordingly, "a tippee assumes a fiduciary duty * * * when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." *Id.* at 660.[2]

The test for a breach of duty by the insider, the Court held, is "whether the insider personally will benefit, directly or indirectly, from his disclosure." *Dirks*, 463 U.S. at 662. The Court identified two different sets of cases in which a factfinder may infer from "objective facts and circumstances" the existence of such a benefit. *Id.* at 663-664. First, "there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." *Id.* at 664; see *id.* at 663 (noting that "pecuniary gain or a reputational benefit that will translate into future earnings" amounts to a personal benefit). Second, "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend," as "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Ibid.*; see *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 311 n.21 (1985).

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[2] In addition, a "corporate 'outsider'" violates the securities laws by misappropriating nonpublic information for trading "in breach of a duty owed not to a trading party, but to the source of the information." *United States* v. *O'Hagan*, 521 U.S. 642, 652-653 (1997).

Under that test, the Court concluded, "there was no actionable violation" in *Dirks* because the insiders in that case did not breach their duty to shareholders. 463 U.S. at 665; see *id.* at 667. The tippers "received no monetary or personal benefit for revealing [corporate] secrets, nor was their purpose to make a gift of valuable information." *Id.* at 667.

b. Petitioner argues (*e.g.*, Pet. 12) that the decision below applies a "personal benefit" test that conflicts with the Second Circuit's decision in *United States* v. *Newman*, 773 F.3d 438 (2014), cert. denied, 136 S. Ct. 242 (2015). In that case, the Second Circuit ruled that "[t]o the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, * * * such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452.

The United States petitioned for a writ of certiorari in *Newman* on the ground that the Second Circuit's ruling erroneously departed from the definition of "personal benefit" set forth by this Court in *Dirks*—a definition that encompasses the benefit obtained from conferring a gift of information on a relative or friend. See U.S. Pet. 18-22 (No. 15-137) (*Newman* Pet.). The government pointed out in its petition the existence of a conflict between *Newman* and the Ninth Circuit's decision in the instant case. Although the facts of this case do demonstrate a "meaningfully close personal relationship" between Maher and Michael within the meaning of the *Newman* standard, in upholding petitioner's conviction the court below did not require

evidence of an "objective" and "consequential" exchange between the brothers that presented a "potential gain" for Maher "of a pecuniary or similarly valuable nature." 773 F.3d at 452; see *Newman* Pet. 22-24.

On October 5, 2015, this Court denied the government's petition in *Newman*. See 10/5/15 Order List. No different result is warranted here. The split in authority alleged in the petition in this case is precisely the same split in authority alleged in the *Newman* petition, see, *e.g.*, Pet. 14 ("this case presents the identical issue on which the government sought review in *Newman*"), and no meaningful developments have taken place in the short space of time since this Court considered and denied the *Newman* petition.[3]

Petitioner asserts (Pet. 12-14) that this case presents a better vehicle than *Newman* did for this Court's review of the personal-benefit issue; he contends that the Second Circuit's ruling on the meaning of personal benefit was not outcome-determinative in that case because of a separate ruling about whether the defendants had knowledge of any benefit. But as the government explained in its *Newman* filings, the knowledge ruling was not an obstacle to this Court's review. The Second Circuit's erroneous personal-benefit ruling infected that court's knowledge ruling—

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[3] The *Newman* respondents stated in their briefs in opposition that some district courts had interpreted the Second Circuit's ruling narrowly. See, *e.g.*, Br. for Todd Newman in Opp. 29 (No. 15-137); see also, *e.g.*, *United States* v. *Melvin*, 2015 WL 7077258, at *15 (N.D. Ga. Nov. 10, 2015); *SEC* v. *McGinnis*, 2015 WL 5643186, at *18-*19 (D. Vt. Sept. 23, 2015); *SEC* v. *Holley*, 2015 WL 5554788, at *5 (D.N.J. Sept. 21, 2015). No Second Circuit decision since *Newman* has clarified its holding or addressed factual circumstances like those in this case.

and the outcome in *Newman* therefore might well have changed if this Court had deemed the Second Circuit's personal-benefit standard erroneous and remanded. See *Newman* Pet. 29-31; U.S. Reply Br. 6-9 (No. 15-137).

Indeed, review is less warranted here than in *Newman* because the decision that petitioner urges this Court to review is correct and wholly consistent with *Dirks*. The court of appeals recited *Dirks*'s explanation that an insider personally benefits when he gifts confidential information to a trading relative or friend, and it correctly determined that this "holding of *Dirks* governs this case." Pet. App. 12. As the court stated, "Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned." *Ibid.* (quoting 463 U.S. at 664); see *ibid.* (reciting Maher's testimony that he tipped Michael to "benefit" him and to "fulfill whatever needs he had") (brackets omitted). The court of appeals thus faithfully applied this Court's precedent to reach a factually and legally correct result, and its decision should remain undisturbed.

2. Petitioner also contends (Pet. 15-21) that the court of appeals' affirmance of the district court's decision to give a deliberate ignorance instruction did not sufficiently enforce a requirement of "deliberate actions" and therefore conflicts with this Court's decision in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011), and with the decisions of other courts of appeals. No such conflict exists. This Court has denied certiorari in a number other cases involv-

ing the same issue,[4] and the same result is warranted here.

a. The decision below is fully consistent with this Court's decision in *Global-Tech*. Indeed, the court of appeals discussed *Global-Tech* in determining that the district court's deliberate ignorance instruction was warranted by the evidence in this case.

i. *Global-Tech*, a civil patent case, concerned whether "a party who 'actively induces infringement of a patent' under 35 U.S.C. § 271(b) must know that the induced acts constitute patent infringement." 131 S. Ct. at 2063. The Court held that knowledge of the infringing nature of the acts is required under Section 271(b) and that the knowledge requirement could be satisfied by "willful blindness." *Id.* at 2068. To determine the standard that should be used to ascertain the existence of willful blindness in the patent-inducement context, the Court looked to the criminal context, observing that "[t]he doctrine of willful blindness is well established in criminal law." *Ibid.* Surveying the courts of appeals, the Court explained that "[w]hile the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways," they "all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* at 2070. The Court stated that "[w]e think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Ibid.*

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[4] See, *e.g.*, *Bourke* v. *United States*, 133 S. Ct. 1794 (2013) (No. 12-531); *Brooks* v. *United States*, 133 S. Ct. 839 (2013) (No. 12-218).

The Court distilled these aspects of willful blindness from the varying formulations used by the courts of appeals. *Global-Tech*, 131 S. Ct. at 2070 n.9. For instance, the Court approvingly cited the Second Circuit's decision in *United States* v. *Svoboda*, 347 F.3d 471, 480 (2003), cert. denied, 541 U.S. 1044 (2004), which held that a willful blindness instruction is appropriate if the evidence shows that the defendant "was aware of a high probability of the disputed fact" and "deliberately avoided confirming that fact." See *Global-Tech*, 131 S. Ct. at 2070 n.9. The Court also cited a Fifth Circuit decision, see *ibid.*, that held that a willful blindness instruction is appropriate if the record supports inferences that the defendant was "subjectively aware of a high probability of the existence of" a fact and "purposely contrived to avoid learning" of it. *United States* v. *Freeman*, 434 F.3d 369, 378 (2005) (quoting *United States* v. *Scott*, 159 F.3d 916, 922 (5th Cir. 1998)).

The *Global-Tech* Court did not suggest that it intended its distillation of the "basic requirements" of willful blindness, 131 S. Ct. at 2070, to supersede or replace the range of circuit court formulations on which it relied. Rather, the Court's approving citation of varying verbal formulations of willful blindness demonstrates the opposite. These formulations, the Court recognized, in fact reflected "agree[ment]" on the core requirements of willful blindness, notwithstanding differences in the terminology. *Ibid.*

In evaluating the adequacy of the Federal Circuit's willful blindness standard, the Court examined whether that standard included the core requirements of willful blindness. *Global-Tech*, 131 S. Ct. at 2071. The Court concluded that the Federal Circuit had depart-

ed from the "proper willful blindness standard" applied by the other courts of appeals because it required only a "known risk" of infringement and "deliberate indifference" to that risk, rather than a subjective belief that infringement has likely occurred and "active efforts * * * to avoid knowing about the infringing nature of the activities." *Ibid.* The Court did not suggest that it found the Federal Circuit's standard inadequate because that court had used wording that was different from the Court's. Rather, the Court emphasized that the Federal Circuit's standard required only recklessness and was therefore substantively more lenient than the standard that the Court drew from the decisions of other courts of appeals. *Ibid.*

ii. In this case, the court of appeals found that the evidence supported the district court's decision to give a deliberate ignorance instruction. Pet. App. 23-25. That instruction charged the jury that petitioner should be deemed to have the requisite knowledge if he was "aware of a high probability that he obtained information that had been disclosed in violation of a duty of trust and confidence" and "deliberately avoided learning the truth"—but not if he was merely "careless or reckless." *Id.* at 38-39.

The court of appeals' decision is not in any tension with *Global-Tech*. Petitioner contends (Pet. 16-21) that the court's analysis omits the second requirement of *Global-Tech*'s willful blindness formulation: that the defendant took "deliberate actions" to avoid learning of the fact at issue. To the contrary, the court of appeals applied that requirement. The court correctly explained that the evidence in this case, which showed that petitioner had overwhelming reasons to believe

that the information on which he traded came from an insider who was breaching a fiduciary duty, either demonstrated the existence of actual knowledge or gave rise to an inference that petitioner "deliberately refrained from asking" about the source of the information, Pet. App. 25; see *id.* at 24—that is, in the words of the jury instruction, that he deliberately avoided learning the truth. That analysis clearly connotes that petitioner must have taken steps to avoid discovering key information about the corrupt insider trading scheme. It is difficult to imagine how a person could deliberately avoid learning of a fact without engaging in some sort of deliberate conduct. Thus, the court of appeals' ruling is consistent with *Global-Tech*'s statement that a finding of willful blindness requires sufficient evidence that a defendant took "deliberate actions to avoid confirming a high probability of wrongdoing." 131 S. Ct. at 2070; see *id.* at 2070 n.9 (approvingly citing instructions requiring that a defendant "intentionally failed to investigate th[e] facts" or "purposely closed his eyes to avoid knowing" facts).

Petitioner also insists that the court of appeals' analysis would permit a finding of willful blindness where a defendant had been only reckless or negligent, contrary to *Global-Tech*'s strictures. That is not so. *Global-Tech* held that two "basic requirements" for a finding of willful blindness—knowledge of a high probability that the fact exists and deliberate efforts to avoid learning of it—"properly give willful blindness an appropriately limited scope that surpasses recklessness and negligence." 131 S. Ct. at 2070. Because the court of appeals applied both requirements set forth in the *Global-Tech* formulation, the

court's analysis did not permit the willful blindness issue to go to the jury based on evidence of recklessness or negligence alone.

Petitioner's insistence that he was subjected to a test for willful blindness that improperly reduced the legal standard to mere recklessness or negligence is especially unwarranted in light of the fact that the district court instructed the jury in this case that it could not find such blindness if it found "that [petitioner] was simply careless or reckless." Pet. App. 39. Given the "almost invariable assumption of the law that jurors follow their instructions," *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987), no risk exists that the properly instructed jury found willful blindness on the basis of reckless or negligent actions.

b. Contrary to petitioner's argument (Pet. 19), the decision below is also consistent with the Seventh Circuit's decision in *United States* v. *Macias*, 786 F.3d 1060 (2015).

In *Macias*, the government's case rested on the proposition that the defendant knew that money he was transporting from the United States to Mexico was drug proceeds—but the defendant testified that he thought it was proceeds from smuggling aliens. 786 F.3d at 1061. The defendant "never asked what was being smuggled, and so (if his testimony is believed) never was disabused of his assumption that it was people, not drugs, that were being smuggled." *Ibid.*

The Seventh Circuit held that the evidence did not support the district court's decision to give a willful blindness instruction. The court stated that it was unlikely that Macias had any reason to suspect that the money was drug proceeds as opposed to immi-

grant-smuggling proceeds. Indeed, he had reason to think the latter—and, the Seventh Circuit explained, "[i]t seems more likely that the cartel would not have told him what it was smuggling. For he had no need to know—and sophisticated gang members, like naval officers, know that 'loose lips sink ships.'" *Macias*, 786 F.3d at 1062; see *ibid.* (stating that no evidence existed that Macias suspected "he might be working for a drug cartel" and "took active steps to avoid having his suspicions confirmed"). The court acknowledged that "there indeed are circumstances in which a failure to ask questions is unnatural," but held that the facts before it did not amount to such circumstances. *Id.* at 1063.

That holding is consistent with the court of appeals' decision below. Unlike Macias, petitioner had "ample reasons" to suspect the critical facts and to seek to confirm them, and it is therefore reasonable to infer that his failure to do so involved a deliberate act. Petitioner was investing "large sums of money on short notice, in companies in which he had never invested previously"; the information on which he based the trades "was both highly accurate and inherently proprietary in nature, suggesting that it came from a source with inside access to the various companies"; and he "knew the Kara family well," indicating "that he was aware of Maher's employment at Citigroup and of the Kara brothers' close relationship." Pet. App. 24-25. Thus, as the court of appeals observed, the jury "could rationally have concluded that the reason [petitioner] did not know" that the information he got from Michael originated with Maher "was that he deliberately refrained from asking." *Id.* at 25. In light of this, a decision by petitioner not to confirm the nature

of the tips was deliberate action in ways that Macias's mere failure to inquire—in a circumstance where he had no reason to think to inquire—was not. Macias merely "failed to display curiosity," *Macias*, 786 F.3d at 1063; in contrast, to the extent that petitioner did not have actual knowledge, he deliberately (and unnaturally) acted to avoid substantiating that which he must have thought to be true.

c. Petitioner suggests (Pet. 20) the existence of some general confusion or disharmony in the courts of appeals, asserting that various circuits "have had varied responses to *Global-Tech*." That suggestion is misguided. *Global-Tech* does not suggest that lower courts must adopt the precise verbal formulation that the Court used to synthesize the standards employed by the courts of appeals, and those courts are enforcing the core requirements identified in *Global-Tech*.

Petitioner points out (Pet. 20 & n.8) that the Third and Eighth Circuits have changed their pattern instructions on deliberate ignorance to track the *Global-Tech* formulation more closely. That linguistic change is permissible, but it does not suggest any substantive disagreement. And, in any event, the pattern instructions on which petitioner relies cannot create a circuit conflict warranting this Court's review, because those instructions, like all pattern instructions, are not intended to bind courts, but are instead merely "helpful suggestions." *United States* v. *Norton*, 846 F.2d 521, 525 (8th Cir. 1988); see *United States* v. *Maury*, 695 F.3d 227, 259 (3d Cir. 2012), cert. denied, 133 S. Ct. 1600 (2013).

Petitioner also cites (Pet. 20 & n.10) to decisions from the First, Fifth, Sixth, and Eleventh Circuits that he says "upheld willful blindness instructions that

omit any requirement that the defendant take deliberate actions to avoid knowledge." But none of those decisions is in any conflict with *Global-Tech* either. Each of them involves instructions substantially similar to the instructions at issue in cases that this Court favorably cited in *Global-Tech*. See *United States* v. *Reichert*, 747 F.3d 445, 451 (6th Cir. 2014) (upholding instruction substantially the same as the instruction upheld in *United States* v. *Holloway*, 731 F.2d 378, 380-381 (6th Cir. 1984) (per curiam), which this Court favorably cited in *Global-Tech*, 131 S. Ct. at 2070 n.9); *United States* v. *Grant*, 521 Fed. Appx. 841, 847-848 (11th Cir. 2013) (unpublished) (finding no plain error in deliberate ignorance instruction and noting that the instruction "matched almost verbatim" the instruction upheld in *United States* v. *Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994), cert. denied, 515 U.S. 1145 (1995), which this Court favorably cited in *Global-Tech*, 131 S. Ct. at 2070 n.9); *United States* v. *Denson*, 689 F.3d 21, 24-25 (1st Cir. 2012) (upholding instruction that tracked the instruction upheld in *United States* v. *Perez-Melendez*, 599 F.3d 31, 41 (1st Cir. 2010), which was itself favorably cited in *Global-Tech*, 131 S. Ct. at 2070 n.9), cert. denied, 133 S. Ct. 996 (2013); *United States* v. *Brooks*, 681 F.3d 678, 702-703 (5th Cir. 2012) (upholding instruction materially similar to the instruction upheld in *Freeman*, 434 F.3d at 378, which this Court favorably cited in *Global-Tech*, 131 S. Ct. at 2070 n.9), cert. denied, 133 S. Ct. 836, 133 S. Ct. 837, and 133 S. Ct. 839 (2013).

d. In any event, this case is a poor vehicle for consideration of a *Global-Tech* issue, because any error with respect to the deliberate ignorance instruction here was harmless and therefore not reversible. See

Neder v. *United States*, 527 U.S. 1, 8-15 (1999). The jury was given an actual knowledge instruction, and the evidence showed that petitioner had actual knowledge that Michael's stock tips were coming from Maher and that Maher was benefiting from providing them. In resisting that harmlessness analysis, petitioner suggests a lack of proof that he actually "knew that Maher Kara was the source of Michael Kara's stock recommendations." Pet. 21. But as the court of appeals explained, and as the government emphasized at closing argument, the evidence strongly and directly established that very fact: Michael testified that he told petitioner that the information was coming from Maher, and petitioner took actions (such as hiding his trading by using someone else's account) that verify his guilty knowledge. See Pet. App. 5 (citing evidence, including Michael's testimony, showing that petitioner "knew full well that Maher Kara was the source of the information"); see also 9/27/13 Tr. 1806-1807, 1815 ("We also heard additional testimony from Michael, that he repeatedly told [petitioner] that the information came from Maher.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
ROSS B. GOLDMAN
Attorney

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